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NO. _____

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROGER LUSSIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

A. WHETHER THE SECOND CIRCUIT ERRED IN APPLYING THIS COURT'S DECISION IN *VICTOR V. NEBRASKA*, ___ U.S. _____, 114 S.Ct. 1239 (1994), WHERE THE COURT HAD PREVIOUSLY HELD THAT AN IDENTICAL INSTRUCTION WAS OF CONSTITUTIONAL DIMENSION.

B. WHETHER THE SECOND CIRCUIT'S DECISION DEVIATES FROM THIS COURT'S PRECEDENTS WITH RESPECT TO TRIAL COUNSEL'S DUAL REPRESENTATION OF THE PETITIONER, A KEY GOVERNMENT WITNESS, AN ALLEGED UNINDICTED COCONSPIRATOR AND A VICTIM.

C. WHETHER THE SECOND CIRCUIT ERRED IN AFFIRMING THE WAIVER PROCEDURE EMPLOYED BY THE DISTRICT COURT WITH RESPECT TO TRIAL COUNSEL'S CONFLICT OF INTEREST WHERE SAID WAIVER WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY.

D. WHETHER THE SECOND CIRCUIT ERRED IN FAILING TO ADDRESS THE DISTRICT COURT'S INCLUSION OF CONSEQUENTIAL DAMAGES IN IT'S LOSS CALCULATION PURSUANT TO U.S.S.G. §2F1.1 WHERE SAID DAMAGES WERE NOT REASONABLY FORESEEABLE.

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NO. _____

SUPREME COURT OF THE UNITED STATES
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ROGER LUSSIER,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Roger Lussier, respectfully requests this Honorable Court grant the petition for writ of certiorari to review the judgment of the United States Court of Appeals entered on August 18, 1995, and the subsequent denials of the Motion for Further Appellate Review, Supplemental Motion for Stay of Mandate Pending Appeal and/or Motion for Leave to File Further Petition for Rehearing (hereinafter "Motion for Further Appellate Review") and Motion to Recall Mandate issued on December 20, 1995, and February 5, 1996,

respectively.

OPINION BELOW

The opinion of the court below was reported at 64 F.3d 38 (2nd Cir. 1995), *rehearing denied*, No. 94-1377 (2nd Cir. October 17, 1995). (A.1).[1] However, this opinion was withdrawn from publication at the request of the Court of Appeals. The Court of Appeals denied a Motion for Further Appellate Review on December 20, 1995. (A.31). On February 5, 1996, the Court of Appeals denied a Motion to Recall Mandate for *En Banc* Review. (A.32).

JURISDICTION

The decisions of the court below were entered on August 18, 1995, December 20, 1995 and February 5, 1996, respectively. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1). The petition is filed within the additional time period permitted by this Court in its order dated January 16, 1996.

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT: "No person shall be held to answer for a capital, or otherwise infamous

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[1] All references to the Appendix, *infra*, will appear herein as "(A.'page #')".

crime, ... nor be deprived of life, liberty, or property, without due process of law; . . ."

SIXTH AMENDMENT: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . to have compulsory process for obtaining witnesses in favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On September 7, 1993, a Grand Jury sitting in Burlington, Vermont, returned a twenty-count indictment against the petitioner alleging four separate bank fraud schemes related to his former position as the president of Lyndonville Savings Bank ("LSB").

On November 1, 1993, a hearing was held at the request of the government concerning trial counsel's potential conflict of interest at which the district court found that there "appears to be no conflict of interest." However, the court accepted a proffer of waiver from the petitioner purporting to waive the conflict of interest which his defense counsel had as a result of his representation of a Government witness. The petitioner was

convicted of seventeen of the twenty counts in the Indictment.

The petitioner's Sentencing Hearing was held on June 21, 1994, at which the petitioner was sentenced to 46 months on all counts. On June 28, 1994, the petitioner filed his Notice of Appeal. The petitioner was granted bail pending appeal by the district court.

On August 18, 1995, the court below issued its decision affirming the petitioner's conviction. *United States v. Lussier*, 94-1377 (August 18, 1995). (A.1).

On October 20, 1995, the petitioner filed a Motion for Further Appellate review, based upon *United States v. Birbal*, 62 F.3d 456 (2nd Cir. 1995), which had been decided by the Second Circuit on August 2, 1995, after Lussier's Brief had been filed and argued, but before the denial of Lussier's appeal on August 18, 1995. In *Birbal*, the Second Circuit reversed the defendants' convictions based upon a constitutionally deficient reasonable doubt instruction which was given to the jury by U.S. District Court Judge Franklin Billings. Judge Billings gave the same instruction to the jury

at the petitioner's trial. (Tr. X, pp. 2-37, 40-41).[2] This motion was denied by the Second Circuit on December 20, 1995. (A.31) On December 28, 1996, Lussier filed a Motion to Recall Mandate for *En Banc* Review which was also denied on February 5, 1995. (A.32).

REASONS FOR GRANTING THE WRIT

I. **THE DECISION BELOW AFFIRMING THE DISTRICT COURT'S ERRONEOUS REASONABLE DOUBT INSTRUCTION AMOUNTED TO A HARMLESS ERROR ANALYSIS AND IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS.**

A. The Court Below Incorrectly Applied The Decisions Of This Court In Essentially A Harmless Error Analysis With Respect to A Constitutionally Deficient Burden Of Proof Instruction.

The court below rejected petitioner's claim that its ruling in *United States v. Birbal*, 62 F.3d 456 (2d Cir. 1995), and this Court's ruling in *Sullivan v. Louisiana*, 508

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[2]Citations to the trial transcript and the trial transcript in *Birbal* have been included in the instant petition because the record below has thus far been disregarded by the reviewing court. The petitioner is prepared to file copies of the transcripts at the request of this Court.

U.S. 275 (1993), mandated the reversal of the petitioner's convictions. The court below also refused to consider the fact that the instruction which was found to be unconstitutional in *Birbal* was far more devastating in the petitioner's case where it was incorrectly repeated. (See Argument B, *infra*) The Second Circuit, in denying the petitioner's Motion for Further Appellate Review held that:

> ...the repeated instructions in the initial charge that a finding of guilt cannot be made unless the jury is persuaded of guilt beyond a reasonable doubt and especially the subsequent written submission to the jury of the pages of the initial charge that repeated this instruction numerous time and omitted the one use of the word "may" from the initial charge satisfy us that there is no **reasonable likelihood** that the jury did not understand and apply the correct standards.

(A.31)(Emphasis added). The court below erred in apparently attempting to apply this Court's decision in *Victor v. Nebraska*, ___ U.S. ___, 114 S.Ct. 1239 (1994), when it should have applied *Sullivan*.

In *Sullivan*, this Court held that a jury

instruction that it had previously determined to be contrary to the proof beyond a reasonable doubt requirement of *In Re Winship*, 397 U.S. 358, 364 (1970), *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), could never be harmless error pursuant to *Chapman v. California*, 386 U.S. 18 (1967). *Sullivan* 113 S.Ct. at 2081-83; *United States v. Birbal*, 62 F.3d 456, 458-463; *United States v. Edelin*, 996 F.2d 1238, 1243 (D.C. Cir. 1993) *cert. denied* 114 S.Ct. 895 (1994); *United States v. West*, 28 F.3d 748, 751 (8th Cir. 1994); *Harmon v. Marshall*, 69 F.3d 963, 965 (9th Cir. 1995). Additionally, *Sullivan* stands for the proposition that where the proof beyond a reasonable doubt standard has been misdescribed, all of the jury's findings are vitiated. 113 S.Ct. at 2082. This Court reasoned that for the purpose of harmless error analysis, an appellate court cannot make the requisite connection to a "beyond a reasonable doubt" factual finding "where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." *Id.*

In *Victor*, this Court determined that the

standard for a court reviewing a reasonable doubt instruction where an issue has been raised as to the clarity and understandability of the instruction is:

> "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard".

114 S.Ct. at 1243; *United States v. Birbal*, 62 F.3d at 462. In *Victor*, this Court was faced with the task of determining whether the reasonable doubt instructions as a whole were unconstitutional. 114 S.Ct. at 1243. The two instructions reviewed by this Court concerned the definition of reasonable doubt given by the trial court in its instructions to the jury. *Id.* at 1244, 1249. In *Victor*, there was no prior finding that a misdescription of the burden of proof had been made and there was no patent or obvious misstatement of the law. In an effort to assist reviewing courts in analyzing the clarity and understandability of reasonable doubt instructions like those in *Victor*, this Court formulated the "reasonable likelihood" standard of review. *Id.* at 1243.

Accordingly, *Victor* was not intended to apply to cases in which there was clear error in the language of the instruction itself, a misstatement of law or a prior ruling that the instruction was unconstitutional, as in the instant case. Notably, this Court's opinion in *Victor* did not refer to, cite to or rely upon its nine month old opinion in *Sullivan*.

In the case at bar, *Sullivan* is controlling because the Second Circuit, in *United States v. Birbal*, 62 F.3d at 462, 465 held that Judge Billings' identical erroneous burden of proof instruction was constitutionally deficient. In *Birbal*, the Second Circuit, in reviewing Judge Billings' jury instructions held that instructions on reasonable doubt were "constitutionally deficient" and reversed the defendants' convictions. *Id.* at 465.[3] The *Birbal* court concerned itself with the following "erroneous" portion of Judge Billings' reasonable doubt

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[3]Judge Billings gave the exact same instruction to the jury in the petitioner's trial on December 20, 1993, as he gave to the juries in *Birbal* and *United States v. Delibac*, 925 F.2d 610, 614 (2d Cir. 1991). (Tr. X, pp. 2-37, 40-41).

instruction:

> "Should the prosecution fail to prove the guilt of the defendant beyond a reasonable doubt, you *may* acquit the defendant on the basis of the presumption of innocence."

Id. at 460. The court concluded that Judge Billings, by charging the jury that it

> "'may,' rather than 'must,' acquit...gave the jury the clearly unlawful option of convicting on a lower standard of proof."

Id. Thus, having already determined that the instruction was constitutionally deficient, the Second Circuit mistakenly applied *Victor* and concluded that the error was only "partially ameliorated" by a correctly given reasonable doubt instruction several sentences earlier. *Id.* at 461.

The Court engaged in a similar mistaken analysis in the petitioner's case where it erroneously concluded that because the instruction was repeated correctly in writing there was no reasonable likelihood that the jury did not understand and apply the correct standards. (A.31). Although the decision does not cite any authority for its denial of the

petitioner's motion, the court was attempting to apply *Victor* as it attempted to do in *Birbal*.

However, because the Second Circuit had already established that an erroneous reasonable doubt instruction was given, no *Victor* analysis was necessary. Likewise, in the case at bar, having already concluded in *Birbal* that the identical erroneous instruction was of constitutional dimension, *Birbal*, 62 F.3d at 463, the court below should have followed this Court's directive in *Sullivan* and reversed the petitioner's convictions without engaging in a *Victor* analysis.

The Second Circuit would have been required to apply *Sullivan* even if it did not have the benefit of its prior decision in *Birbal*. Because Judge Billings clearly misdescribed the *Winship* burden of proof by using the phrase "may acquit" instead of "must acquit", the Second Circuit should not have engaged in a *Victor* analysis. Here, Judge Billings' misdescription of the burden of proof was clear on its face from the specific language of the instruction such that no *Victor*

analysis was required. *Birbal*, 62 F3d at 460. The court below did not have to look past the clear language of the instruction to determine whether a misdescription had taken place in order to apply *Sullivan*. Pursuant to *Sullivan*, Judge Billings' misdescription of the burden of proof vitiated all the jury's findings. 113 S.Ct. at 2082.

The Ninth Circuit, in a case decided after *Victor*, applied *Sullivan* to a case where the trial judge had failed to instruct the jury as to any of the elements of certain offenses for which he was being tried. *Harmon v. Marshall*, 69 F.3d at 965. In *Harmon*, no *Victor* analysis was necessary because the error was patently obvious as in the instant case.

Even assuming *arguendo*, that the Second Circuit correctly utilized *Victor* in rendering its decision in *Birbal*, once it found, as it did in *Birbal*, 62 F.3d at 463, that the error committed by Judge Billings in his instruction was of constitutional dimension, the court was precluded from repeating its *Victor* analysis of the more defective charge in the petitioner's case. *Sullivan* clearly stands for the

proposition that once an instruction has been found to be of constitutional dimension, it can never constitute harmless error. *Id.* at 461.

Accordingly, having already found the error to be of constitutional dimension, the Second Circuit engaged in what amounted to a harmless error analysis by reexamining Judge Billings' charge in the instant case pursuant to *Victor*.[4] This analysis was strictly prohibited by *Sullivan* because the "essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error" is of constitutional dimension. 113 S.Ct. at 2082.

B. The Court Below Misapplied This Court's Precedent In *Victor* To The Case At Bar.

It is clear from the record that the court misapplied *Victor* to the instant case, assuming *arguendo*, it was correct in doing so. The

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[4]In fact, it is respectfully submitted that by reusing the *Victor* analysis, the Second Circuit employed a standard of review which amounted to something less certain than the harmless error standard announced in *Chapman*. It is respectfully submitted that this result was clearly not contemplated by this Court in its decisions.

record below, when compared to *Birbal*, reveals that in addition to Judge Billings' erroneous use of the phrase "may acquit", he also used the phrase "should acquit". (Tr. X, p.20). The oral charge stated:

> If you find that the defendant was not a knowing participant in the scheme and lacked the specific intent to defraud, you *should* acquit the defendant.

(Tr. X, p.20).(Emphasis added). It is respectfully submitted that this additional error served to confuse the jury in the same manner as Judge Billings' use of the phrase "may acquit". While the word "should" conveys more of a suggested result than the word "may", it by no means prohibits the jury from convicting on a lesser standard like the words "must" or "shall". This additional error was not committed by Judge Billings in *Birbal*. Additionally, Judge Billings submitted his written charge to the jury and stated that he was excluding the burden of proof instruction. (Tr. X, p. 48). Although the Second Circuit focused on the fact that the written charge repeated the Government's burden of proof, the

written charge also repeated the erroneous phrase "should acquit" the defendant. Therefore, the written instruction, when added to Judge Billings' previous oral use of the discretionary words "may" and "should" in his reasonable doubt instruction, clearly "must have left the jury uncertain of the standard it was charged with applying." *Birbal*, 62 F.3d at 460.

The court below attempted to distinguish the instant appeal from *Birbal* by virtue of the fact that Judge Billings allegedly correctly repeated the instruction. However, the instruction that Judge Billings repeated merely stated the Government's burden of proof. The jury's duty to acquit if the Government failed to meet its burden was only mentioned five times by the judge. The first time this portion of the instruction was given to the jury it was stated correctly. (Tr. X, p.5). The second time Judge Billings used the impermissible language "may" acquit. (Tr. X, p.6). The third time the judge again erred by using the language "should acquit." (Tr. X, p.20). The fourth time the judge correctly

instructed the jury that they had a "duty to acquit." (Tr. X, p.23). The fifth time the judge once again used the word "may." (Tr. X, p. 34). Therefore, the jury was correctly instructed only twice and incorrectly instructed on three occasions in the charge.

In *Birbal*, the burden of proof charge was accompanied by an instruction to acquit if the Government failed to meet its burden seven times. (*Birbal*, Tr. IV, pp. 87-107). There, it was correctly stated five times as distinguished from the two occasions that the correct instruction was given in the instant case. Accordingly, the prejudice flowing from the erroneous instruction in petitioner's case was significantly more damaging than the prejudice suffered in *Birbal*. Furthermore, the instruction in *Birbal* contained a litany of correct charges that a finding of guilty cannot be made unless the jury is persuaded that the Government established each element beyond a reasonable doubt. (Tr. IV, pp. 94-108). This, however, in the *Birbal* Court's opinion, did not cure Judge Billings' previous erroneous instruction. 62 F.3d at 460. Thus, the court

below's reliance on the subsequent correctly repeated instructions in the case at bar was factually incorrect, misplaced and unwarranted.

II. THE DECISION BELOW FINDING THAT THERE WAS NO ACTUAL CONFLICT OF INTEREST AND THAT THE PETITIONER'S ALLEGED WAIVER OF A POTENTIAL CONFLICT OF INTEREST WAS UNLAWFUL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

The Second Circuit's decision is not only in conflict with its own decisions but with this Court's decisions in *Wheat v. United States*, 486 U.S. 1692 (1988), *Glasser v. United States*, 315 U.S. 60 (1942), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and the United States Court of Appeals for the Fourth Circuit in *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992).

As the court below correctly noted, "the specter of conflicts of interest arises" during trial, the court must satisfy a two-prong test before representation may continue. The court

> (1) must establish whether the attorney, in fact, labors under an actual or a potential conflict, and, if so, (2) must then ensure that the

conflict is either eliminated or waived. (A.15-16). However, the court erroneously found that both prongs had been met.

The reviewing court must determine whether the conflict is actual or potential. *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994). If actual, the court must determine whether the conflict is "severe." If a defendant did not waive the conflict, or if the waiver procedures were improper, the defendant will be found to have received ineffective assistance of counsel if he can show that the conflict adversely affected his counsel's performance. *United States v. Iorizzo*, 786 F.2d 52, 58-59 (2d Cir. 1986).

A. The Court Below Erred In Failing To Find That An Actual Conflict Of Interest Existed Which Could Not Be Waived By the Petitioner.

The court's decision that the petitioner suffered under conflicts that were at "worst potential" and "non-severe", versus an actual and severe conflict, is unsupported. An actual conflict exists when during representation, the "attorney's and the defendant's interests

'diverge with respect to a material factual or legal issue or to a course of action.'" *United States v. Levy*, 25 F.3d at 155. In the instant case, the record reveals that petitioner's trial counsel, Peter Langrock, previously represented William Hill, a key government witness, in obtaining a plea agreement on behalf of Hill, whose agreement required Hill to testify against the petitioner, Langrock's subsequent client. Further, Langrock had not settled his legal fees with Hill prior to representation of the petitioner. At the time of trial, when Hill was to be called as a principal witness, Langrock was named the mortgagee on Hill's property to satisfy the legal debt.

A defendant is denied effective assistance of counsel if his attorney is burdened by a conflict of interest that adversely affects his defense. *Glasser v. United States*, 315 U.S. at 75. Moreover, unconstitutional multiple representation can never constitute harmless error. *Cuyler v. Sullivan*, 446 U.S. at 349.

When a defendant demonstrates that an actual conflict of interest burdened his trial

attorney, the defendant need not prove prejudice flowing from the conflict, but must merely show that his defense was adversely affected by the conflict. *Id.* at 349-50; *Lace v. United States*, 736 F.2d 48, 49 (2d Cir. 1984). Prejudice is presumed when a defendant demonstrates that

> "counsel actively represented conflicting interests ... [and] that an actual conflict of interest adversely affected his lawyer's performance."

Id.

It is incumbent that the trial judge protect the right of the accused to assistance of counsel, and, where any potential or actual conflicts arise, the court has a duty to ensure that the accused is fully aware of the nature of the conflict and any potential threat to the protection of his interest. *Glasser v. United States*, 315 U.S. at 71; *In Re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977).

Moreover, a criminal defendant's constitutional right to retain counsel of his choice and to waive any conflicts of interest in order to achieve the representation of

chosen counsel is not absolute. *Wheat v. United States*, 486 U.S. at 159-60. Federal courts have an independent interest in criminal cases of enforcing the ethical standards of the profession and ensuring that the legal proceedings are fair to all that observe them. *Id.* at 60.

Conflicts may arise because of potential privilege issues as well as counsel's "pecuniary interest in possible future business," *United States v. Jeffers*, 520 F.2d 1256, 1264 (7th Cir. 1975), *cert. denied* 423 U.S. 1066 (1976), and where

> "the attorney may be required to testify about material aspects of the witness' testimony or otherwise place his own credibility at issue either in cross-examining the witness or in attacking the witness' testimony in summation."

Anwar v. United States, 648 F. Supp. 820, 826 (N.D.N.Y. 1986), *aff'd* 823 F.2d 544 (1987).

Langrock was concerned about both his business relationship with Hill and that his prior representation of Hill would be revealed to the jury, as evidenced by his colloquy with the trial court in which he beseeches the judge

not to exploit his prior representation of Hill to the jury. In *Levy*, the court below specifically found that this was a conflict, or at least unconstitutionally inhibited counsel's performance. 25 F.3d at 157-58.

In the instant case, Langrock's conflict created the possibility of his becoming an unsworn witness. Langrock was forced to cross-examine his prior client, and, in order to impeach that client's credibility, Langrock should have attacked the fact that Hill was testifying pursuant to a plea agreement, an agreement that Langrock negotiated. Once the plea agreement was introduced and attacked, Langrock would have faced the possibility of becoming a witness. In order to effectively represent the petitioner at trial, Langrock was faced with the prospect of attacking the very plea agreement he helped create in order to impeach his former client. As in *Levy*, the court below should have found that Langrock's desire to avoid being called as a witness made him willing to sacrifice or compromise certain trial strategies and defenses.

If the district court had any doubts as to

whether an actual conflict existed, Langrock's requested side bar conference after Hill's direct examination should have eliminated them. During this sidebar, Langrock asked the government whether it was going to "get into the fact that I [Langrock] represented him?" (Tr. V, p.53). At least at that point, Langrock should have been disqualified or the court should have secured an additional waiver from the petitioner because, despite the waiver, Langrock still felt constrained to effectively cross-examine Hill. *United States v. Swartz*, 975 F.2d 1042, 1049 (4th Cir. 1992). Clearly, the concerns expressed by Langrock and his complete failure to attempt any meaningful cross-examination of Hill compel a finding that an actual conflict of interest adversely effected Langrock's performance. *Cuyler v. Sullivan*, 446 U.S. at 350.

More importantly, Langrock's cross-examination of Hill was inconsistent with his prior cross-examination of other cooperating witnesses. This was most evident from his failure to introduce Hill's plea agreement into evidence. *United States v. Malpiedi*, 62 F.3d

465, 469 (2d Cir. 1995). (counsel's inability to pursue a trial strategy because of ethical obligation is a lapse in representation).

Furthermore, there should be no doubt that this conflict was "severe" given Langrock's additional conflicts affecting his representation of the petitioner. At the time of trial, in addition to representing Hill, Langrock was also representing both Elliott, an alleged indicted coconspirator and a LSB Board member, and LSB itself. These additional conflicts were ignored in the Opinion, but further served to violate the petitioner's Sixth Amendment rights.

At a minimum, Langrock's multiple conflicts divided his loyalty between the petitioner, former clients and present clients creating a strong appearance of impropriety that could not be waived. *United States ex rel. Stewart v. Kelly*, 870 F.2d 854, 857 (2d Cir. 1989). Similar to *Levy*, the conflicts between Hill, Elliott, Lyndonville Savings Bank, the petitioner and Langrock should not be considered as independent conflicts, but should be considered together. *United States v. Levy*,

25 F.3d at 157.

B. The Alleged Waiver Obtained By The District Court Was Inadequate And In Conflict With The Decisions Of This Court And Other United States Courts Of Appeals

Assuming *arguendo* that the conflicts were in fact not actual conflicts, the waiver extracted by the district court did not follow the proper procedure articulated in *United States v. Curcio*, 680 F.2d 881, 888-89 (2d Cir. 1982), and was not made "knowingly, intelligently and voluntarily". *Wheat v. United States*, 486 U.S. at 161-63. The Second Circuit has repeatedly articulated the procedure to secure a valid waiver. *United States v. Levy*, 25 F.3d at 153 n.4. (quoting *United States v. Iorizzo*, 786 F.2d at 59)

Although the court below found that the trial court had "sufficiently complied with the *Curcio* procedures," it is difficult to discern what it meant by sufficient compliance. (A.22). First, the district court never advised the petitioner as to the problems inherent in being represented by an attorney with a conflict. Second, the petitioner's responses to the

court's inquiries as to whether he understood the risk of the conflict, as conceded by the court below, "were not couched in the preferred narrative form." (A.23).

The court below dismissed the petitioner's argument that his attainment of only an eighth grade education had a bearing on his understanding of the extent of the conflict because he was the President and Chairman of the Board of a savings and loan institution. (A.23-24). Regardless of his business position, the fact that he did not have a legal education, much less a high school diploma, clearly undermines the conclusion that he had a discreet understanding of the nature of attorney conflicts. Indeed, the court below indicated that it was "troubled" by the fact that the petitioner had not been advised of his right to seek independent advice of counsel. (A.25). Once again, the court below has created a "Lussier" exception to its own precedents and the precedents of this Court.

The Second Circuit has departed from the waiver procedure requirements in only very limited circumstances, including *United States*

v. Friedman, 854 F.2d 535, 574 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989), where the defendant was a lawyer himself, had self-initiated consulting with independent counsel, and signed an affidavit stating as much, and *United States v. Jenkins*, 943 F.2d 167, 176 (2d Cir.), *cert. denied*, 502 U.S. 1014 (1991), where the defendant was a former assistant district attorney, defense attorney and served on the Senate Judiciary Committee while a State Senator. Surely, the situation present in the case at bar cannot be deemed comparable to such cases given that the petitioner had only an eighth grade education and obviously was not an attorney.

III. THE COURT BELOW'S FAILURE TO ADDRESS THE DISTRICT COURT'S GUIDELINES' CALCULATIONS WAS ERRONEOUS WHERE SAID CALCULATIONS ARE IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The decision of the court below is in conflict with the decisions of the Third Circuit and Ninth Circuit. *United States v. Daddona*, 34 F.3d 163, 171-72 (3d Cir.), *cert. denied*, 115 S.Ct. 515 (1994); *United States v.*

Newman, 6 F.3d 623, 630 (9th Cir. 1993).

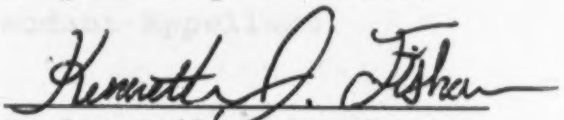
Although the court below declined to address any of the issues raised by the petitioner relating to the sentence imposed by the district court, other than to state that they are without merit, (A.30), the evidence elicited at the sentencing hearing did not, by a preponderance of the evidence, establish an actual loss in the form of a $426,000.00 charge off by LSB. Indeed, the district court's findings regarding this purported loss do not even rise to an allegation that the petitioner's conduct was otherwise wrongful or unlawful. The fact that LSB later decided to sell the property in question for less than its appraised value cannot be attributed to the petitioner. This type of loss was, at most, consequential and incidental and not properly included in a loss calculation. *United States v. Daddona*, 34 F.3d at 171-72; *United States v. Newman*, 6 F.3d at 630; *cf. United States v. Stanley*, 12 F.3d 17, 20-21 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1572 (1994). Application Note 7(c) to §2F1.1 permits the use of consequential damages **only** in limited cases

involving procurement fraud and product substitution cases. This limitation clearly shows that the intent of the Sentencing Commission was to exclude consequential damages in general. *United States v. Newman*, 6 F.3d at 630. Even under Note 7(c), the consequential damages must have been "reasonably foreseeable". In the instant case, the fact that LSB would under sell its collateral was not a foreseeable result of the petitioner's conduct nor was it foreseeable that the bank would be required by the FDIC to "charge off" the uncollected balance after foreclosing on the property. The notion that one department of the Government can create a loss which impacts on a defendant's sentence in a federal prosecution offends the very notion of due process.

CONCLUSION

Based on the foregoing arguments and authorities, the petitioner respectfully urges this Honorable Court to grant his petition for a writ of certiorari.

Respectfully submitted,



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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA,
Appellee,

v.

ROGER LUSSIER,
Defendant-Appellant.

No. 94-1377

United States Court of Appeals,
Second Circuit.

Before: NEWMAN, McLAUGHLIN and PARKER, Circuit Judges.

Defendant appeals from a judgment of conviction and sentence imposed in the United States District Court for the District of Vermont (Billings, J.). Defendant was convicted by a jury of bank fraud, in violation of 18 U.S.C. §§ 2, 1344; making false entries, in violation of 18 U.S.C. §§ 2, 1005; accepting commissions for procuring loans, in violation of 18 U.S.C. §§ 2, 215; money laundering, in

violation of 18 U.S.C. §§ 2, 982, 1957; and making false statements, in violation of 18 U.S.C. § 1001. Although defendant appeals on numerous grounds, we write only to address whether defendant was denied effective assistance of counsel because of an alleged conflict of interest.

AFFIRMED.

F. LEE BAILEY, Bailey, Fishman & Leonard, Boston, MA (Kenneth J. Fishman, Peter Charles Horstmann, of counsel), for Defendant-Appellant.

PAUL J. VAN DE GRAAF, Assistant United States Attorney for the District of Vermont, Burlington, VT, (David V. Kirby, Acting United States Attorney, James J. Gelber, Assistant United States Attorney, of counsel), for Appellee.

McLAUGHLIN, Circuit Judge:

Roger Lussier, President and Chairman of the Board of Lyndonville Savings Bank,

was charged in a twenty-count indictment with bank fraud, false bank entries, receipt and payment of illegal commissions, money laundering, and making false statements to federal bank examiners. After a jury trial in the United States District Court for the District of Vermont (Franklin S. Billings, Jr., Judge), Lussier was convicted on seventeen of the twenty counts. The trial court sentenced him to forty-six months' imprisonment on all counts for which he was convicted, with the exception of one count for which he received a twelve month sentence. All sentences are to run concurrently, but were stayed pending appeal.

Lussier raises numerous issues on this appeal. We write only to address whether Lussier was denied effective assistance of counsel based on his attorney's alleged conflict of interest. We have fully considered the other claims advanced on this appeal, and find them to be without

merit.

BACKGROUND

We discuss only those facts relevant to whether Lussier was denied effective assistance of counsel.

The Colonnade Deal

Independent Bankgroup, Inc. ("IBG") owned several Vermont banks. Lussier was President and Chairman of the Board of one of the banks, the Lyndonville Savings Bank ("LSB"). During a federal investigation of several of the IBG banks, including LSB, the government uncovered a pattern of criminal conduct, whereby Lussier and others used the IBG banks to fund certain illegal transactions. One of these transactions involved a scheme by Lussier to arrange for LSB loans to purchase and re-sell the Colonnade Restaurant, located in Lyndonville, Vermont (the "Colonnade deal"). The deal was allegedly executed by a three-man partnership, comprising of Lussier, who acted behind the scenes, William Hill, who was the front man, and

Arthur Elliot, another member of the LSB board of directors.

The seeds of the Colonnade deal were sown in early 1988, when David Archambeau purchased the Colonnade Restaurant from Ashley Gray for $500,000. Archambeau financed the deal with a $375,000 first mortgage from LSB, and a $100,000 second mortgage from Gray.

Later that year, Archambeau closed the restaurant as a money loser. To avoid foreclosure, Archambeau and Gray agreed to sell the restaurant at an auction conducted by Lussier, who owned an auction firm. The agreement stated that if the auction produced more than $375,000, Gray would forgive the second mortgage in return for a split of the proceeds above $375,000 with Archambeau. If the auction brought less than $375,000, however, Gray would not forgive the second mortgage. Lussier and Elliot signed this agreement as witnesses.

The restaurant went on the auction

block with Lussier as the auctioneer. The land and the building were sold to Hill, the highest bidder, for $295,000. On its face, Hill appeared to be the sole purchaser of the property; but, in fact, he purchased the property in partnership with Elliot. Unbeknownst even to Hill, Lussier was a silent partner with Elliot. The sale enabled Archambeau to pay off LSB's first mortgage.

Hill funded the entire purchase price through a $350,000 loan from LSB. At the LSB board of directors meeting where Hill's loan was approved, Lussier and Elliot urged approval and did not abstain, the usual practice when voting on a loan that involved members of the board.

At about the same time that LSB approved the loan to Hill, Elliot negotiated to sell the restaurant for $475,000 to David Fox, a businessman from New Hampshire. Fox put up no money of his own, but, rather, funded the purchase price

through a $375,000 loan from another one of the IBG banks and a $100,000 personal loan from Elliot and another individual, Gerald Farrington. (Elliot and Farrington, however, obtained the $100,000 through a loan from LSB.) By this time, Hill knew that Lussier was a partner in the deal. The sale to Fox enabled Hill to repay his $350,000 loan to LSB, leaving a profit of almost $90,000. That profit was split equally among the partners: one-third going to Hill, and two-thirds going to Elliot, who, in turn, paid half of that amount to Lussier.

Representation by Peter Langrock

Hill subsequently pled guilty to bank fraud involving an unrelated loan from one of the IBG banks, and he agreed to cooperate fully with the government. During the plea negotiations, Hill was represented by Peter Langrock, a Vermont attorney. After pleading guilty and testifying before the grand jury, Hill gave

the government his file on the Colonnade deal.

At the same time, Langrock was also representing Lussier, who was charged in a twenty-count indictment with: (1) four counts of bank fraud, in violation of 18 U.S.C. §§ 2, 1344; (2) three counts of making false entries, in violation of 18 U.S.C. §§ 2, 1005; (3) four counts of accepting commissions for procuring loans, in violation of 18 U.S.C. §§ 2, 215; (4) four counts of money laundering, in violation of 18 U.S.C. § 2, 982, 1957; and (5) five counts of making false statements, in violation of 18 U.S.C. § 1001. The government, sensing a conflict of interest, filed a pretrial motion for a hearing to resolve Langrock's potential conflict. The government noted that Hill was likely to be called as a government witness at Lussier's trial.

At the hearing, Hill was represented by new counsel, David Gibson, and Lussier

was represented by Langrock. The government's principal concerns were two-fold: first, that Langrock's prior representation of Hill would prevent Langrock from inquiring into privileged matters on cross-examination, unless Hill waived the attorney/client privilege; and second, that Lussier should make a knowing, voluntary and intelligent waiver of any potential conflict.

Hill.

The court first queried Langrock and Gibson about the potential conflict. It then questioned Hill, himself, about waiving the attorney/client privilege arising from his prior representation by Langrock:

THE COURT: Very well. Mr. Hill, as you probably heard, that Mr. Langrock now represents Mr. Lussier, although he did represent you. As I understand it, it's a possibility that you may be called as a witness in the

United States v. Lussier case. And if that is true, of course, Mr. Langrock, unless -- would not be able to cross examine you on any conversations that he had between you and Mr. Langrock unless you would waive, voluntarily, your attorney/client privilege. Do you understand what I'm saying?

MR. HILL: Yes, I believe I do. And I have no problem with that, your Honor.

THE COURT: In other words, that you would waive any privilege that you might have in connection with the conversations that you had with Mr. Langrock when he was representing you.

MR. HILL: I have no problem with that, your Honor.

THE COURT: Very well. And Mr. Gibson's explained, as I gather, fully the potential conflicts and your rights in this matter?

MR. HILL: Yes, I believe so.

THE COURT: Is that right?

MR. HILL: I believe so, yes.

THE COURT: And as I understand it, you have -- you would waive any privilege, and also you understand that you may well be cross-examined by Mr. Langrock --

MR. HILL: Yes.

THE COURT: -- If you were called as a witness --

MR. HILL: Yes, I do.

THE COURT: -- with respect to these matters?

MR. HILL: Yes, I do.

THE COURT: And you have no objection to that?

MR. HILL: No, I do not.

Lussier.

The court then addressed Lussier about

the potential conflicts of interest posed by Langrock's prior representation of Hill:

THE COURT: Mr. Lussier, as you probably know, you have the right, obviously, to effective counsel and counsel that does not have any conflicts of interest. I would like to know, first, has Mr. Langrock explained to you the possible potential conflict of interest that might exist?

THE DEFENDANT: Yes. I'm more than ready to take the chance.

THE COURT: And do I understand that you would, knowing the potential conflicts, that he represented Mr. Hill previous to this time, that you would waive any conflicts that you might have so that you could have effective counsel?

THE DEFENDANT: Yes.

THE COURT: And Mr. Langrock has fully explained the fact that, as I understand it, he did

represent Mr. Hill --

THE DEFENDANT: Yes, he did.

THE COURT: And knowing that, you still have no objection --

THE DEFENDANT: I have no objection.

THE COURT: -- to Mr. Langrock continuing to represent you?

THE DEFENDANT: I want him to represent me.

THE COURT: Very well. Thank you.

The court concluded, based upon Hill's waiver of the attorney/client privilege and Lussier's waiver of the potential conflict, that "there [was] no conflict of interest to require Mr. Langrock to be disqualified."

Langrock represented Lussier at trial. Lussier was convicted on seventeen of the twenty counts charged in the indictment. As already noted, the trial court sentenced him to a total of forty-six months' imprisonment. Represented by new counsel,

Lussier now appeals. He argues that he was denied effective assistance of counsel at trial, because (1) the district court abused its discretion by allowing him to waive the conflict, and (2) the waiver itself was defective because it was not made knowingly, voluntarily, and intelligently.

DISCUSSION

I. Attorney Conflict of Interest

Although a defendant may generally waive his Sixth Amendment right to a non-conflicted attorney, "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159 (1988); see United States v. Fulton, 5 F.3d 605, 612 (2d Cir. 1993). Thus, when "the specter of conflicts of interest arises," the district court (1) must establish

whether the attorney, in fact, labors under an actual or a potential conflict, and, if so, (2) must then ensure that the conflict is either eliminated or waived. United States v. Levy, 25 F.3d 146, 152-53 (2d Cir. 1994); United States v. Malpiedi, No. 94-1632, slip op. at 6271 n.2 (2d Cir. Aug. 9, 1995); see Holloway v. Arkansas, 435 U.S. 475, 484 (1978).

A. Inquiry Obligation

When a district court learns of even the possibility of a conflict of interest, it must inquire into the details of the attorney's interests to determine whether the conflict is actual, potential, or nonexistent. Levy, 25 F.3d at 153; Strouse v. Leonardo, 928 F.2d 548, 555 (2d Cir. 1991). Failure to fulfill this obligation constitutes per se reversible error. Levy, 25 F.3d at 153-54.

Here, the court clearly met this initial inquiry obligation. After the government notified the court of the

potential conflict presented by Langrock's earlier representation of Hill, the court conducted a pretrial hearing to explore the issue. At the hearing, the government highlighted the problems that could arise from Langrock's prior representation of Hill. Langrock then assured the court that he had already discussed those potential conflicts with Lussier and that Lussier, nonetheless, wanted Langrock to continue to represent him.

David Gibson, Hill's new attorney, assured the court that he too had discussed the potential conflicts with Hill, and that Hill was willing to waive the attorney/client privilege with respect to his prior communications with Langrock. Thus, the court, fulfilling its initial inquiry obligation, established at least that a possible conflict existed. See id. at 154 (holding that district court met initial inquiry obligation by obtaining representations from counsel concerning

possible conflict of interest).

B. Disqualification/Waiver Obligation

With a possible conflict established, the district court then had the more demanding task of determining whether the conflict could be resolved by a waiver, or whether Langrock had to be disqualified. If a conflict is so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation, then the court must disqualify the attorney. Id. at 153. If, however, the court determines that the conflict is not severe or that there is only the possibility of a conflict, then the court must follow the procedures set out in United States v. Curcio, 680 F.2d 881, 888-90 (2d Cir. 1982), to secure a knowing, voluntary, and intelligent waiver from the defendant of his right to a non-conflicted attorney. Levy, 25 F.3d at 153.

Here, there were two possible areas of conflict: first, that Langrock's prior

representation of Hill would prevent Langrock from inquiring into privileged matters on cross-examination of Hill; and second, that any unpaid legal fees could place Hill and Langrock in a debtor/creditor relationship, thus undermining Langrock's whole-hearted allegiance to Lussier.

When a defense attorney cross-examines a former client who is a witness against the defendant, a conflict of interest may exist; absent a waiver from the former client, the attorney cannot inquire into privileged matters. See United States v. Iorizzo, 786 F.2d 52, 57-58 (2d Cir. 1986); Ciak v. United States, No. 94-2245, slip op. at 4990-91 (2d Cir. June 20, 1995); Malpiedi, No. 94-1632, slip op. at 6273. Here, however, after discussing the potential conflicts with Gibson, Hill unambiguously waived his attorney/client privilege with respect to his prior communications with Langrock. Thus, the

court correctly concluded that the primary area of conflict -- Langrock's potential inability to cross-examine Hill fully at trial -- was significantly diminished by this waiver. See, e.g., Curcio, 680 F.2d at 885 (suggesting that waiver of privilege by one defendant so that his attorney could use confidential information to defend his co-defendant diminished the conflict).

Of course, a conflict may also arise when an attorney cross-examines a former client who owes him a fee. Here, Langrock stated that he had arranged with Hill to be paid for work he had performed, with downward adjustments for any work duplicated by Gibson. There is no evidence that these representations were untrue, that the fees remained unpaid, or that the fee arrangements between Hill and Langrock interfered with Langrock's effectiveness at trial. Thus, we find that the conflicts were at worst potential, i.e., creating merely the possibility of some unforeseen

problem arising at trial because Langrock had previously represented Hill. Accordingly, the district court did not abuse its discretion in determining that a valid waiver could be effected.

Waiver

Because there existed only a potential for a non-severe conflict, a valid waiver could be made. See Levy, 25 F.3d at 153, 155. To secure a valid waiver, the court must: (1) advise the defendant about potential conflicts; (2) determine whether the defendant understands the risks of those conflicts; and (3) give the defendant time to digest and contemplate the risks, with the aid of independent counsel if desired. Curcio, 680 F.2d at 888-90; see Iorizzo, 786 F.2d at 59; United States v. Jenkins, 943 F.2d 167, 176 (2d Cir.), cert. denied, 502 U.S. 1014 (1991). When "considering if a defendant's waiver was adequate, [however,] we are more concerned with whether the defendant appreciated his

predicament and made a properly informed choice than we are with whether the trial judge recited any particular litany of questions." Jenkins, 943 F.2d at 176; see Curcio, 680 F2d at 888 ("If the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally that he nevertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent . . . . ") (citation omitted).

We find that the court sufficiently complied with the Curcio procedures. First, Lussier was apprised of the potential conflicts. The government's motion for a pretrial hearing detailed the possible conflicts posed by Langrock's prior representation of Hill, and Lussier's response, filed by Langrock, further addressed those concerns. Lussier was

present at the hearing when the parties discussed the conflicts in open court. Langrock stated, and Lussier confirmed, that they had fully discussed the extent of the potential conflicts. Although Lussier's responses to the court's inquiries were not couched in the preferred narrative form, he unequivocally stated that he was "more than ready to take the chance" that Langrock might be burdened by a potential conflict. See Curcio, 680 F.2d at 889 (noting that although questions designed to elicit a narrative response are preferable to questions designed to elicit "yes" or "no" answers, "'[m]ere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver'") (emphasis added) (quoting United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975)).

We dismiss Lussier's argument that his attainment of only an eighth grade education demonstrates his lack of

sophistication and ability to understand the extent of the conflict. We find it untenable that Lussier could achieve the position of President and Chairman of the Board of a savings and loan institution, as well as orchestrate and participate in numerous schemes to defraud the bank and the government, and yet not have the acumen to understand the risks involved with his attorney's potential conflict, about which there was ample disclosure. See Faretta v. California, 422 U.S. 806, 835 (1975) (holding that defendant with high school education was "literate, competent, and understanding, and . . . voluntarily exercising his informed free will," and should have been allowed to forgo counsel altogether); Curcio, 680 F.2d at 888-89 (suggesting that the question whether a waiver is knowing and voluntary should be determined by whether the defendant is informed and has the capacity for making a rational decision, not based on the

defendant's formal education level). Not only did Lussier understand what he was doing, but his actions were apparently driven by his desire to provide himself with competent trial counsel of his own choosing.

We are somewhat troubled by the court's failure to inform Lussier that he was entitled to independent counsel to advise on waiver. Nevertheless, Lussier, an experienced businessman who plainly understood the nature of the conflict, had ample time to contemplate the risks. Over two weeks passed between the filing of the motion papers for a hearing on the conflict and the hearing itself. Lussier was present at the hearing where the government reiterated its concerns, Langrock and Gibson gave full responses, and Hill waived the attorney/client privilege. Thus, although the court perhaps could have done more, under the circumstances of this case, we find that the procedures followed by the

trial court were sufficient to obtain a knowing, intelligent, and voluntary waiver under Curcio.

II. Prejudice

Even if the waiver were somehow flawed, Lussier, nonetheless, received effective assistance of counsel. When a court fails to obtain from the defendant an adequate waiver of the conflict, the defendant still has not suffered ineffective assistance of counsel unless his attorney has either (1) a potential conflict of interest that resulted in prejudice to the defendant; or (2) an actual conflict of interest that adversely affected the attorney's performance. Levy, 25 F.3d at 152 (citations omitted). An attorney labors under an actual, as opposed to a potential, conflict "when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'"

Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993) (quoting Cuyler v. Sullivan, 446 U.S. 335, at 356 n.3 (1980)), cert. denied, 114 S. Ct. 1407 (1994); Malpiedi, No. 94-1632, slip op. at 6272 (citations omitted).

Here, we find that, at most, Langrock labored under a potential conflict. At the pretrial hearing, the district court properly established that the primary areas of concern were the attorney/client privilege and the fee arrangements arising from Langrock's prior representation of Hill. As previously discussed, Hill's waiver of the privilege and the discussions between the court and counsel regarding the fee arrangements significantly diminished these concerns. Langrock was free to cross-examine Hill on any matter -- including confidential communications -- and there was no evidence of unpaid fees at the time of trial. Thus, there was no material divergence between Lussier's and Langrock's interests.

Because the conflict was merely potential, the government had the lesser burden of demonstrating that Lussier was not prejudiced by Langrock's alleged failure to cross-examine Hill effectively. See United States v. Edwardo-Franco, 885 F.2d 1002, 1007 (2d Cir. 1989). We find that the government has met that burden.

Lussier faults Langrock for not formally introducing Hill's written plea agreement into evidence. This contention need not detain us long. The government fully questioned Hill about the details of the agreement. This put the jurors on notice of any potential bias on Hill's behalf. The actual plea agreement itself would have added little, if anything, to this colloquy.

Lussier also faults Langrock for not eliciting from Hill the exact time when Lussier entered the partnership -- arguing that the government's case depended upon Lussier's being a partner at the time of

the auction. In the government's direct examination of Hill, however, Hill categorically stated that he and Elliot were partners at the time of the auction. He added that he knew Lussier was a partner at the time the restaurant was re-sold to Fox, but did not recall when Lussier actually joined the partnership.

Thus, contrary to Lussier's assertion, Hill's testimony is consistent with the defense's theory that Lussier was not a partner at the time of the initial auction. Hill's testimony also comports with the government's theory that Lussier was a hidden partner at the time of the auction and that Hill was merely unaware of Lussier's interest at that time. Because Hill's testimony supported the theories of both parties, the jury was free to draw its own conclusions as to that testimony's significance and meaning.

We therefore conclude that, even if the waiver were somehow flawed, Lussier

suffered no prejudice from Langrock's purportedly deficient cross-examination of Hill.

Lussier raises numerous other issues on this appeal. We have fully considered each of these claims, and find them to be without merit.

CONCLUSION

Because Lussier knowingly and voluntarily waived his attorney's potential conflict of interest, he was not denied effective assistance of counsel. Accordingly, the judgment of conviction and sentence is AFFIRMED.

United States Court of Appeals
For the Second Circuit

USA	)	
v.	)	**No. 94-1377**
ROGER LUSSIER	)	

NOTICE OF MOTION FOR FURTHER APPELLATE REVIEW, SUPPLEMENTAL MOTION FOR STAY OF MANDATE PENDING APPEAL AND/OR MOTION FOR LEAVE TO FILE FURTHER PETITION FOR REHEARING

Decided: 12/20/95

IT IS HEREBY ORDERED that the motion be and it hereby is denied; the repeated instructions in the initial charge that a finding of guilt cannot be made unless the jury is pursuaded of guilt beyond a reasonable doubt and especially the subsequent written submission to the jury of the pages of the initial charge that repeated this instruction numerous times and omitted the one use of the word "may" from the initial charge satisfy us that there is no reasonable likelihood that the jury did not understand and apply the correct standards.

NEWMAN

McLAUGHLIN

PARKER

Circuit Judges.

United States Court of Appeals
For the Second Circuit

USA	)	
v.	)	**No. 94-1377**
ROGER LUSSIER	)	

NOTICE OF MOTION TO RECALL MANDATE FOR *EN BANC* REVIEW

Decided: 2/05/96

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

FOR THE COURT,
BY:

Beth J. Meador
Administrative Attorney